Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

MARIA DEL CONSUELO CEVILLA,
Petitioner,

v.

ALBERTO R. GONZALES, as
Attorney General of the United States,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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BACKGROUND

After Cevilla lost her Seventh Circuit bid, she continued pleading with the Department of Homeland Security to join a motion urging the Board of Immigration Appeals to exercise *sua sponte* reopening discretion since the Seventh Circuit had exhaustively exposed the flaws in the Immigration Judge's reasoning upon which the Board had declined to exercise such discretionary reopening after recognizing the dire health problems afflicting Cevilla's son and her mother. As Cevilla waited, lightning struck. The Second Circuit withdrew the opinion the Seventh Circuit had used to pitch its "our hands are tied" answer to Cevilla, replacing it with another consistent with Cevilla's position on rehearing petition. But on motion to recall the mandate to reconsider its own opinion relying on the withdrawn Second Circuit's, the Seventh Circuit merely answered no.

QUESTION PRESENTED

1. Under the U.S. Supreme Court's precedents holding that courts of appeals have inherent authority to recall their mandates, subject to review for abuse of discretion, was it an abuse of discretion, a failure to exercise discretion when exercise of discretion would

appropriately avert miscarriage of justice in this exceptional case in which the Seventh Circuit denied Cevilla's motion to recall the mandate, moving that the Seventh Circuit reconsider its denial of rehearing because it had relied for authority in denying her petition for review on a Second Circuit opinion the Second Circuit vacated and withdrew subsequently, leaving the Seventh Circuit's decision denying review in Cevilla's case without that external authority on which the Seventh Circuit had pinned its interpretation of 8 U.S.C. § 1252(a)(2)(D) to be a jurisdiction-stripping statute that turns out, by the Second Circuit's later opinion, to have been an erroneous reading of the conference report behind that statute? *Compare Chen v. U.S. Dep't. of Justice*, 434 F.3d 144 (2d Cir. 2006), with *Chen v. U.S. Dep't. of Justice*, 471 F.3d 315, 2006 U.S. App. LEXIS 30106 (2d Cir. Dec. 7, 2006).

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OPINION BELOW

The Seventh Circuit's decision denying Cevilla's motion to recall mandate is reproduced in the appendix at 1. The Seventh Circuit's decision denying Cevilla's petition for rehearing and petition for rehearing *en banc*, 2006 US App. LEXIS 15439 (7th Cir. Jun. 27, 2006), is reproduced in the appendix at 2-3. The Seventh Circuit's opinion denying Cevilla's petition for review is published in the Federal Reporter at 446 F.3d 658 (2006), and reproduced in the Appendix at 4–15. The Board of Immigration Appeals' decision denying Cevilla's motion to reopen is reproduced in the appendix at 16-17.

JURISDICTION

The Seventh Circuit denied rehearing and rehearing *en banc* on June 27, 2006. The mandate issued on July 5, 2006. On December 7, 2006, the Second Circuit revised its *Chen I* decision and issued its *Chen II* opinion, which prompted Cevilla's January 19, 2006, motion to recall mandate, which the Seventh Circuit denied on January 26, 2007. The 90th day after that date is April 26, 2007. The Court has jurisdiction under 28 U.S.C. § 1254(1) on writ of *certiorari*.

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1229b(b)

(1) IN GENERAL.-The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien-

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 212(a)(2), 237(a)(2) , or 237(a)(3), subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

8 U.S.C. § 1252(a)(2)(D)

JUDICIAL REVIEW OF CERTAIN LEGAL CLAIMS- Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

STATEMENT OF FACTS

Maria del Consuelo Cevilla was born Maria del Consuelo Covarrubias on July 29, 1968, at La Piedad, Michoacan de Ocampo, Mexico ("Cevilla"). Cevilla married her husband, Jose-Gabriel Cevilla, on December 28, 1989. When the Immigration and Naturalization Service ("INS") commenced removal proceedings against Cevilla, the Cevillas had two children; Edgar Neptali Cevilla-Covarrubias, born on October 10, 1990, and Daniel-Eli Cevilla, born on April 11, 1998, both in Milwaukee. While proceedings were pending, the Cevillas had their third child, Denise Arlene, in Milwaukee on December 16, 2002.

The INS previously admitted Cevilla at O'Hare on April 6, 1990, permitting her to remain here as a

visitor until November 5, 1990. Cevilla remained beyond that date and came into the INS's crosshairs after an "immigration consultant," a *notario,* gave Cevilla fraudulent legal advice to file an I–485. INS used the I-485 information to issue the NTA it filed with the Chicago Immigration Judge.

However, jurisdiction would not vest with the Immigration Judge, nor proceedings commence then—for the signature on the USPS Form 3811 return receipt the INS filed to prove it had served Cevilla the NTA to toll accrual of her 10 years of continuous physical presence proved a forgery, according to Cevilla's handwriting expert's un-refuted testimony, forcing the INS to re–issue and serve the NTA after and concede that Cevilla had accrued 10 years of continuous physical presence.

Once Cevilla conceded her removability for visa–overstay, the INS also conceded Cevilla's good moral character to qualify for cancellation of removal under 8 U.S.C. §§ 1229b(b)(1)(A) & (B), respectively. However, after a merits hearing before the Immigration Judge, on October 16, 2001, the Immigration Judge issued his written decision denying Cevilla's EOIR-42B applications for cancellation of removal and voluntary departure.

Cevilla had, prior to the October 16th merits hearing, tried without success to get medical records from her son's and her mother's doctors, to prove exceptional and extremely unusual hardship to a U.S. citizen or permanent resident relative, the fourth prong of the cancellation test under 8 U.S.C. § 1229b(b)(1)(D). Cevilla's counsel had advised the Immigration Judge about the uncooperative physicians during the hearing.

Nevertheless, the Immigration Judge held that Cevilla had failed to prove the requisite hardship. The Immigration Judge, relying on Cevilla's mother's confused mental state, held Cevilla's testimony lacking credibility and, therefore, that Cevilla failed to prove her 10 years of continuous physical presence. The Immigration Judge credited Cevilla's sister's testimony in similar ways, to impeach Cevilla's, but Cevilla's sister's testimony went to a period prior to the 10 years of continuous physical presence Cevilla was required to prove, from April 6, 1990. Still, the Immigration Judge took those two witnesses to have been more compelling than Cevilla, the federal documents including the INS stamps in Cevilla's passport, Cevilla's children's birth certificates issued by the State of Wisconsin, and mortgage and other documentary evidence putting Cevilla in this country for the period in question. The Board of Immigration Appeals affirmed.

After Cevilla was able to obtain her mother's new psychiatric report, and her son Edgar had a new physician who certified that Edgar's medical condition was of the seriousness that would place Edgar's health in jeopardy if Cevilla were to be deported, Cevilla filed a motion to reopen with the Board of Immigration Appeals nine months after the Board's rule. The Board held that motion untimely because it was beyond the regulatory 90-day limit.

However, the Board also stated that it might have reopened, *sua sponte,* in light of the new evidence of medical hardship to Edgar and Consuelo, Cevilla's mother, had Cevilla sufficiently challenged the Immigration Judge's analysis of her continuous-physical presence claim, finding the Immigration Judge's holding "not clearly erroneous." Cevilla sought the Seventh Circuit's review.

A panel of the Seventh Circuit heard oral arguments on February 15, 2006, and issued its decision denying Cevilla's petition and a final judgment on May 1, 2006. That panel held that *Chen v. U.S. Dep't. of Justice,* 434 F.3d at 151-55 ("*Chen I*"), had closed "one door to relief." *Cevilla v. Gonzales*, 446 F.3d 658, 661-62 (7th Cir. 2006).

The panel also held based on *Chen I* that the Real ID Act's creation of 8 U.S.C. § 1252(a)(2)(D) only

permits judicial review of removal orders when petitions for review challenging those orders present constitutional claims or questions of law, which means questions of statutory construction relating to the Immigration and Nationality Act ("INA"). *See Id., citing Chen I*, 434 F.3d at 151-55.

Cevilla petitioned the panel to rehear her petition for review, suggesting *en banc* rehearing, but the panel denied both. *See Cevilla v. Gonzales*, No. 05-2387, 2006 U.S. App. LEXIS 16439, * (7th Cir. Jun. 27, 2006). The mandate issued on July 5, 2006, and no proceedings followed until the Second Circuit issued a revised opinion in *Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 2006 U.S. App. 30106, * (2d Cir. Dec. 7, 2006) ("*Chen II*"). That prompted Cevilla to file her January 19th motion to recall the mandate, which the Seventh Circuit denied on January 26, 2007.

REASONS FOR GRANTING THE PETITION

I. **The Court should grant the petition for writ of *certiorari* because the Seventh Circuit abused its discretion by failing to exercise that discretion to recall the mandate in Cevilla's case, which would avert miscarriage of justice. The Seventh Circuit's denial of Cevilla's petition for review relies heavily on the Second Circuit's *Chen I* opinion, which the Second Circuit vacated months after the Seventh Circuit had invoked it in Cevilla's case as authority**

on the meaning of "questions of law" in and the scope of review under 8 U.S.C. § 1252(a)(2)(D). The miscarriage of justice is especially significant because Cevilla raised the very issue that underlies the Second Circuit's *vacatur* of its own *Chen I* opinion to the Seventh Circuit on petition for rehearing. In addition, the Seventh Circuit itself persuasively eviscerated the Board's and Immigration Judge's bases for denying Cevilla relief, making *Chen I*'s reading of § 1252(a)(2)(D) the sole basis for that court's denial of Cevilla's petition for review. The Seventh Circuit's reconsideration of denial of Cevilla's petition is, thus, an exceptional circumstance. Discretion is its holder's prerogative, but failing to exercise it completely can be abuse of that discretion. The Seventh Circuit's denial of Cevilla's motion to recall betrays no reasoning behind it and may very well be a mere reaction to the motion without consideration of its merits. This is an issue of nationwide importance, because courts of appeals routinely follow or adopt each others' opinions in developing internal circuit rules. If, as obtains here, a rule arises in one circuit from an opinion another circuit deems flawed and withdraws, it seems that the least required is that the adopting circuit re-examine its adoption of the withdrawn opinion. Interpretation of 8 U.S.C. § 1252(a)(2)(D) is by no means settled, let alone well-settled, and the Seventh Circuit's declining to put Cevilla's case before its *en banc* court and, now, to at least issue some kind of statement on whether

the Seventh Circuit affirmatively stands behind the withdrawn *Chen I* opinion of the Second Circuit leaves the issue hanging and badly in need of resolution.

The Seventh Circuit's holding that *Chen I* closes the door for relief to Cevilla and holding that "questions of law" means questions of statutory construction under the INA, also adopted from *Chen I*, is unsettled by *Chen II's vacatur* of *Chen I* in that respect, and the Second Circuit's holding that the scope of judicial review under § 1252(a)(2)(D) is broader than just constitutional claims and questions of statutory construction under the INA.

As the Second Circuit's revised opinion states, Cevilla's petition for review presented the very kind of question courts of appeals used to review under *habeas corpus*, which 8 U.S.C. § 1252(a)(2)(D) restores after the attempt to strip such review authority, which Congress did in the 1996 amendments. *See Chen II*, 2006 U.S. App. LEXIS 30106, at *30. The Immigration Judge held that Cevilla lacked credibility on her 10 years of continuous physical presence, pinning that finding of fact on conflicts the Immigration Judge found between Cevilla's mother's and Cevilla's sister's testimony and that given by Cevilla to support the continuous physical presence prong for cancellation of removal. The Seventh Circuit held,

"Cevilla testified initially that she first traveled to the United States in 1990 with her mother, that her first child was born here that year, and that she had resided continuously here since. Had this been the only testimony, the immigration judge would have accepted that Cevilla had proved the requisite continuity of residence. But he was disturbed by the conflicting evidence of Cevilla's mother and sister. The mother testified that she entered by herself sometime before 1992, then went back to Mexico that year and brought her daughter back and that the daughter's first child was born that year, that is, 1992. At the time of her testimony, the mother was an elderly woman in poor physical and mental health. Her testimony was not plausible, because the child's birth certificate indicated that he had been born in 1990. Nevertheless the immigration judge gave weight to the testimony. *He should not have.* The sister testified that Cevilla first visited the United States in 1985 and traveled back and forth between Mexico and the United States until 1990 when she settled here for good. The fact that Cevilla did not reside continuously in the United States from 1985 *is irrelevant*, since she needed only to have resided here from 1990 to satisfy the 10-year requirement."

Cevilla, at 662-63 (emphasis added), *citing Morales-Morales v. Ashcroft*, 384 F.3d 418, 427-28 (7th Cir. 2004); *Lopez-Alvarado v. Ashcroft*, 381 F.3d 847, 854 (9th Cir. 2004).

The Seventh Circuit held the children's births in this country noteworthy in addition to the other equities it cited, because the INS did nothing to counter that evidence with any reason for Cevilla to have returned to Mexico. *See Id.* at 663. The Seventh Circuit noted that Cevilla's entire family resides here, and Cevilla would have shouldered monumental risk to attempt an illegal border crossing, both further negating the proposition that Cevilla returned to Mexico after admission as a visitor on April 6, 1990. *See Id.*

The Seventh Circuit, apparently with *Chen I's* construction of § 1252(a)(2)(D)'s scope as only questions of INA construction and constitutional claims on its mind, nevertheless, held that the Immigration Judge's "inexplicable...[crediting of] the mother's obviously erroneous testimony," *Id.*, still didn't make "the analysis that generated the finding, the procedure and evidence on which that analysis rested, and the finding itself...so unreasonable as to constitute a denial of due process." *Id.* That is another

way of saying that Cevilla had no "question of law" or constitutional claim.

Chen II, however, re-opens the door *Chen I* had closed to what Cevilla presented being defined a "question of law" because the Immigration Judge's fact-finding was flawed by the Immigration Judge's error of law–for the Immigration Judge erroneously believed he could legally credit the implausible testimony of Cevilla's old and infirm mother and the irrelevant testimony of her sister. The Second Circuit held that Congress, *per* conference report accompanying the Real ID Act, sought to limit the jurisdiction-stripping statutes of 1996 in which it had restricted courts of appeals' review of challenges under the INA. *See Chen II*, at *23-24. Said the Second Circuit,

> "While the Conference Report refers to 'statutory construction questions,' we do not interpret that reference to be exhaustive, but merely illustrative. We construe the intent of Congress's restoration under the REAL ID Act rubric of 'constitutional claims or questions of law' to encompass the same types of issues that courts traditionally exercised in habeas review over Executive detentions. As stated in the Conference Report, 'the Supreme Court recognized that Congress could, without raising any constitutional questions, provide an

> adequate substitute through the courts of appeals.'"

Id.

Cevilla, therefore, presented a question of law reviewable under *Chen II's* rubric, which is, incidentally, the Seventh Circuit's position *ante-Chen I*. The Seventh Circuit held so while denying Cevilla's petition for review, thus,

> "Even before the enactment of subsection (D), we had held in *Morales-Morales v. Ashcroft*, 384 F.3d 418, 421-23 (7th Cir. 2004), that the interpretation by an immigration judge of the statutory phrase 'continuous physical presence' was judicially reviewable, and *Cuellar Lopez v. Gonzales*, 427 F.3d 492, 493-94 (7th Cir. 2005), reaffirmed this holding after enactment of subsection (D). Neither case, however, involved review of the application of the 'continuous physical presence' standard to the facts of the case."

Cevilla, 446 F.3d at 660-61.

It is, therefore, clearly because of the Seventh Circuit's reading of *Chen I* that the Seventh Circuit held the Immigration Judge's error of law in Cevilla's case to

fall short of what's required under 8 U.S.C. § 1252(a)(D) for Cevilla to prevail on petition for review, and denied it. But if *Chen I* is no more, it is a gross miscarriage of justice for Cevilla to remain in the wilderness because of it.

Moreover, the Board had indicated its willingness to invoke its *sua sponte* discretionary authority to reopen even in light of an untimely motion to reopen, because of the compelling seriousness of the medical hardship Cevilla presented the Board concerning her son, and her mother. Cevilla respectfully submits that *Chen II* makes a substantial difference to the outcome in her case, for purposes of construction of § 1252(a)(2)(D). Cevilla's case fits under those rare and extraordinary circumstances warranting courts of appeals' exercise of discretion to recall their mandates. *See, e.g., Calderon v. Thompson*, 523 U.S. 538, 549-50 (1998), *citing Hawaii Housing Authority v. Midkiff*, 463 U.S. 1323, 1324 (1983) (REHNQUIST, J., in chambers); *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 249-250 (1944).

Cevilla could not have foreseen the Second Circuit's reversal of course in December, 2006, in the summer of 2006 when she let be the Seventh Circuit's denial of rehearing petition after she argued to the Seventh Circuit that *Chen I* misread the conference report to the Real ID Act, which *Chen II* admits more or

less. Cevilla's case is that "grave, unforeseen contingency..." of which this Court held the "sparing use of the power [to recall mandates to salvage as]...last resort[.]" *Calderon*, 523 U.S. at 550.

CONCLUSION

The Court should grant the petitioner's petition for a writ of *certiorari,* vacate the decision of the Seventh Circuit Court of Appeals, and remand this case.

Respectfully submitted,

Date: 04/25/2007

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In the
United States Court of Appeals
For the Seventh Circuit

No. 05-2387

MARIA del CONSUELO CEVILLA,
Petitioner,

v.

ALBERTO R. GONZALES,
Respondent.

JANUARY 19, 2007, FILED—JANUARY 26, 2006, DECIDED

Before POSNER, *Circuit Judge.*

The motion to recall the mandate filed by Petitioner's counsel on January 19, 2007, is DENIED.

In the
United States Court of Appeals
For the Seventh Circuit

No. 05-2387

MARIA del CONSUELO CEVILLA,
Petitioner,

v.

ALBERTO R. GONZALES,
Respondent.

On Petition for Review of an Order of
the Board of Immigration Appeals.
No. A 77 771 892

JUNE 14, 2006, FILED—JUNE 27, 2006, DECIDED

Before POSNER, ROVNER, and SYKES, *Circuit Judges.*

On June 14, 2006, petitioner filed a petition for rehearing and petition for rehearing *en banc*. All of the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore DENIED.

In the
United States Court of Appeals
For the Seventh Circuit

No. 05-2387

MARIA del CONSUELO CEVILLA,
Petitioner,

v.

ALBERTO R. GONZALES,
Respondent.

On Petition for Review of an Order of
the Board of Immigration Appeals.
No. A 77 771 892

FEBRUARY 15, 2006, ARGUED—MAY 1, 2006, DECIDED

Before POSNER, ROVNER, and SYKES, *Circuit Judges.*

POSNER, *Circuit Judge.* Maria Cevilla, a citizen of Mexico, entered the United States in 1990 on a visitor's

visa. Eventually the government initiated proceedings to remove (deport) her. She conceded removability but sought cancellation of removal on the basis that she met the dual requirements for that form of relief of (1) having resided in the United States continuously for 10 years beginning in 1990 and (2) removal would cause extreme hardship. 8 U.S.C. § 1229b(b)(1). After a hearing, the immigration judge determined that neither requirement had {660} been met and denied relief. The Board of Immigration Appeals affirmed. Nine months later Cevilla filed a motion with the Board to reopen the proceeding, attaching to the motion new evidence concerning hardship. The Board denied the motion, noting that it was untimely, but adding:

> "The new evidence presented by the respondent with regard to the physical and emotional difficulties faced by her mother and son might have caused us to consider a *sua sponte* grant of the motion. However, the Immigration Judge also made a determination, based on the inconsistent testimony of the respondent, her mother and her sister, that the respondent had not established the statutorily-required 10 years of continued presence in the United States. The Immigration Judge's decision in this regard has not been sufficiently

> challenged on appeal to warrant a finding by this Board that it was clearly erroneous. Cevilla asks us to review the denial."

The government argues that we have no jurisdiction; that while the Board can if it wishes entertain an untimely petition to reopen, 8 C.F.R. § 1003.2(a); *Ajose v. Gonzales*, 408 F.3d 393, 395 (7th Cir. 2005); *Joshi v. Ashcroft*, 389 F.3d 732, 734 (7th Cir. 2004); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 248-49 (5th Cir. 2004), its decision whether to do so or not is unreviewable. A number of cases do so hold, on the ground that the decision to forgive an untimely filing is purely discretionary. *Martinez-Maldonado v. Gonzales*, 437 F.3d 679, 682-83 (7th Cir. 2006); *Pilch v. Ashcroft*, 353 F.3d 585, 586 (7th Cir. 2003); *Assaad v. Ashcroft*, 378 F.3d 471, 475-76 (5th Cir. 2004) (per curiam); *Belay-Gebru v. INS*, 327 F.3d 998, 1001 (10th Cir. 2003); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 475 (3d Cir. 2003). But as emphasized in *Belay-Gebru* and *Calle-Vujiles*, all are cases in which the Board's order that was sought to be reviewed was indeed based on an exercise of uncabined discretion rather than on the application of a legal standard. (*Compare Smriko v. Ashcroft*, 387 F.3d 279, 292-93 (3d Cir. 2004).) The Administrative Procedure Act denies judicial review of agency action in cases where there is no law for a reviewing court to apply. 5

U.S.C. § 701(a)(2); *Delgado v. Gonzales*, 428 F.3d 916, 920 (10th Cir. 2005); *Schneider v. Feinberg*, 345 F.3d 135, 148 (2d Cir. 2002) (*per curiam*). This is not such a case; the denial of the motion to reopen was based on a determination that a factual finding by the immigration judge was not clearly erroneous.

The government fails to note, however, that the general "no law to apply" principle of judicial review of administrative action has been superseded in the immigration context by 8 U.S.C. § 1252(a)(2), as amended by the REAL ID Act in May 2005. Subsection (B) of section 1252(a)(2) provides that "notwithstanding any other provision of law . . . no court shall have jurisdiction to review (i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title" (emphasis added). Both the Board's initial order, and its order declining to reopen the case, are "judgment[s] regarding the granting of relief under section . . . 1229b." However, subsection (D) of section 1252(a)(2), also added by the REAL ID Act and thus post-dating the cases on which the government relies, provides that "nothing in subparagraph (B) . . ., or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions

of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section" (emphasis added). Even before the enactment of subsection (D), we {661} had held in *Morales-Morales v. Ashcroft*, 384 F.3d 418, 421-23 (7th Cir. 2004), that the interpretation by an immigration judge of the statutory phrase "continuous physical presence" was judicially reviewable, and *Cuellar Lopez v. Gonzales*, 427 F.3d 492, 493-94 (7th Cir. 2005), reaffirmed this holding after the enactment of subsection (D). Neither case, however, involved review of the application of the "continuous physical presence" standard to the facts of the case.

Noting that subsection (B) of 8 U.S.C. § 1252(a)(2) is captioned "discretionary denials of relief," several courts have held that despite its uncompromising language it does not bar judicial review of rulings that are not discretionary in character. *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 618 (9th Cir. 2006); *Santana-Albarran v. Ashcroft*, 393 F.3d 699, 705 (6th Cir. 2005); *cf. Garcia-Melendez v. Ashcroft*, 351 F.3d 657, 661 (5th Cir. 2003); *Lopez-Alvarado v. Ashcroft*, 381 F.3d 847, 850-51 (9th Cir. 2004). The Second Circuit disagrees, noting that subsection (D) explicitly confines judicial review to constitutional questions and "questions of law." *Bugayong v. INS*, 442 F.3d 67, 73 (2d Cir. 2006)

(*per curiam*); *Chen v. U.S. Dep't. of Justice*, 434 F.3d 144, 151-55 (2d Cir. 2006).

The difficulty that has given rise to this disagreement is that while the purpose of the door-closing statute appears to be to place discretionary rulings beyond the power of judicial review (hence the caption of subsection (B)), the statute itself, read literally, goes further and places all rulings other than those resolving questions of law or constitutional issues beyond the power of judicial review. A further complication is that the application of a legal standard (whether negligence, possession, or, as in this case, continuous physical presence) to facts is both recognized to be different from a purely factual determination (for example, that the defendant was driving more than 60 m.p.h when he struck the plaintiff) and reviewed by the same clearly-erroneous or substantial-evidence standard as a purely factual determination. *E.g., Thomas v. General Motors Acceptance Corp.*, 288 F.3d 305, 307 (7th Cir. 2002); *St. Mary's Medical Center v. Disco Aluminum Products Co.*, 969 F.2d 585, 588-89 (7th Cir. 1992); *Mucha v. King*, 792 F.2d 602, 604-05 (7th Cir. 1986); *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320, 1334 and n. 29 (11th Cir. 1999).

The issue of the meaning of "questions of law" in section 1252(a)(2)(D) is discussed most thoroughly in Chen v. U.S. Dep't. of Justice, supra, which reviews the legislative history and finds that originally the phrase "questions of law" had been "pure questions of law," that "pure" had been dropped as "superfluous," and that Congress had intended by its use of the phrase "questions of law" to distinguish between "statutory-construction questions" and "factual questions" and to permit judicial review only of answers to the former. 434 F.3d at 153, citing the conference report, H.R. Rep. No. 109-72, at 175 (2005). *See also Ramadan v. Gonzales*, 427 F.3d 1218, 1222 (7th Cir. 2005). The report of a conference committee is one of the more reliable forms of legislative history, *Bassiouni v. FBI*, 436 F.3d 712, 716 (7th Cir. 2006); *Disabled in Action of Metropolitan New York v. Hammons*, 202 F.3d 110, 124 (2d Cir. 2000); *RJR Nabisco, Inc. v. United States*, 955 F.2d 1457, 1462-63 (11th Cir. 1992); *Railway Labor Executives Ass'n v. ICC*, 735 F.2d 691, 701 (2d Cir. 1984), and the committee's explanation is consonant with the ordinary meaning of "questions of law" and with Congress's evident purpose of limiting judicial review of removal cases.

Chen closes one door to relief. But because constitutional rulings are excepted from the door-closing statute along {662} with rulings on questions of

law, a petitioner might want to argue that the analysis of the facts by the immigration judge or the Board of Immigration Appeals had been so wacky as to constitute a denial of due process of law, *Remer v. Burlington Area School Dist.*, 286 F.3d 1007, 1013 (7th Cir. 2002); *Abdulrahman v. Ashcroft*, 330 F.3d 587, 596-97 (3d Cir. 2003), though a mere procedural or evidentiary error must not be confused with a denial of due process. *Saloum v. U.S. Citizenship & Immigration Services*, 437 F.3d 238, 243-44 (2d Cir. 2006); *Sanchez-Cruz v. INS*, 255 F.3d 775, 779 (9th Cir. 2001); *McCurdy v. Dodd*, 352 F.3d 820, 827 (3d Cir. 2003); *Toscano-Gil v. Trominski*, 210 F.3d 470, 474 (5th Cir. 2000). But no due process challenge may be made unless the challenger has been (or is threatened with being) deprived of life, liberty, or property. *Bangura v. Hansen*, 434 F.3d 487, 495-96 (6th Cir. 2006). Cevilla has a liberty interest in remaining in the United States, but prevailing on the issue of continuous physical presence in the United States would not give her any right to remain here. It would merely give her an opportunity to establish extreme hardship, which is an appeal to the government's discretion, rather than a substantive entitlement. *Guerra-Soto v. Ashcroft*, 397 F.3d 637, 639 n. 1 (8th Cir. 2005). A procedural entitlement is not a liberty interest. *Olim v. Wakinekona*, 461 U.S. 238, 250-51, (1983); *Hewitt v. Helms*, 459 U.S. 460, 471, (1983);

Russ v. Young, 895 F.2d 1149, 1153 (7th Cir. 1990); *Sealed v. Sealed*, 332 F.3d 51, 57 (2d Cir. 2003). And so "an alien's right to due process does not extend to proceedings that provide only such discretionary relief." *Hamdan v. Gonzales*, 425 F.3d 1051, 1060-61 (7th Cir. 2005); *see Dandan v. Ashcroft*, 339 F.3d 567, 575 (7th Cir. 2003); *Hernandez v. Gonzales*, 437 F.3d 341, 345-46 (3d Cir. 2006).

A complicating factor is that the Board has signaled that it would probably accept Cevilla's claim of extreme hardship if it thought she had been continuously present in the United States for the required 10 years. Does this mean that establishing presence would effectively confer a substantive entitlement on her? It would not even if all the statutory criteria, including extreme hardship, are present, because they are merely preconditions to asking the government to exercise discretion in the alien's favor. See 8 U.S.C. § 1229b(b)(1); *Dave v. Ashcroft*, 363 F.3d 649, 653 (7th Cir. 2004); *Romero-Torres v. Ashcroft*, 327 F.3d 887, 890 (9th Cir. 2003); *Alvidres-Reyes v. Reno*, 180 F.3d 199, 202 (5th Cir. 1999); *cf. Cook v. Wiley*, 208 F.3d 1314, 1322-23 (11th Cir. 2000); *Fristoe v. Thompson*, 144 F.3d 627, 630 (10th Cir. 1998).

And Cevilla could not prevail even if she had a property or liberty interest. For although the Board's determination that she failed to prove 10 years of continuous residence is not persuasive, there was no denial of due process.

Cevilla testified initially that she first traveled to the United States in 1990 with her mother, that her first child was born here that year, and that she had resided continuously here since. Had this been the only testimony, the immigration judge would have accepted that Cevilla had proved the requisite continuity of residence. *Morales-Morales v. Ashcroft*, supra, 384 F.3d at 427-28; *Lopez-Alvarado v. Ashcroft*, supra, 381 F.3d at 854. But he was disturbed by the conflicting evidence of Cevilla's mother and sister. The mother testified that she entered by herself sometime before 1992, then went back to Mexico that year and brought her daughter back and that the daughter's {663} first child was born that year, that is, 1992. At the time of her testimony, the mother was an elderly woman in poor physical and mental health. Her testimony was not plausible, because the child's birth certificate indicated that he had been born in 1990. Nevertheless the immigration judge gave weight to the testimony. He should not have.

The sister testified that Cevilla first visited the United States in 1985 and traveled back and forth between Mexico and the United States until 1990 when she settled here for good. The fact that Cevilla did not reside continuously in the United States from 1985 is irrelevant, since she needed only to have resided here from 1990 to satisfy the 10-year requirement. But the immigration judge thought that the inconsistency between Cevilla's testimony that she first entered in 1990 and the sister's testimony undermined Cevilla's credibility because, after hearing her sister testify, Cevilla acknowledged that she had been in the United States off and on before 1990 though she insisted that 1990 was the date of her last entry. Since the only relevant date of entry was the date on which her continuous residence in the United States began, and since the fact that she had been here intermittently before moving here for good would not make it less probable that she had indeed later moved here for good, it is difficult to understand why the immigration judge thought that "the inconsistencies in the testimonial evidence" warranted a finding that Cevilla had left the United States after 1990. Her first child was born that year, and no reason has been suggested why she might have gone back to Mexico since then. There is no indication of family or business in Mexico; her mother is in the United States along with seven

siblings; both her children are U.S. citizens. She would have had to travel to and from Mexico illegally in order to avoid revealing a break in her residence, and that would have been a risky undertaking. Especially considering the immigration judge's inexplicable decision to credit the mother's obviously erroneous testimony, we do not think that the Board's finding with regard to continuous presence is sound. Nevertheless, the analysis that generated the finding, the procedure and evidence on which that analysis rested, and the finding itself are not so unreasonable as to constitute a denial of due process.

For all these reasons, the petition for review must be DENIED.

PETITION FOR REVIEW DENIED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VA

File: A77 771 892 Date: March 19, 2003

In the Matter of:)
)
Maria Cevilla) IN REMOVAL PROCEEDINGS
)
Respondent.)

MOTION

ON BEHALF OF RESPONDENT: Godfrey Muwonge

ON BEHALF OF DHS: Sylke Merchan
Asst. Chief Counsel

ORDER:

PER CURIAM. The motion to reopen had been filed out of time and will be denied. The final order in these proceedings was entered by the Board on June 24, 2004. Pursuant to 8 C.F.R. § 1003.2(c)(2) (with certain exceptions not relevant here), a motion to reopen in

any case previously the subject of a final decision by the Board must be filed no later than 90 days after the date of that decision. In the instant case, a motion to reopen would have been due on or before September 8, 2004. The record reflects, however, that respondent's motion was not filed with the Board until March 3, 2005. The motion to reopen was therefore filed out of time.

The new evidence presented by the respondent with regard to the physical and emotional difficulties faced by her mother and son might have caused us to consider a *sua sponte* grant of the motion. However, the Immigration Judge also made a determination, based on the inconsistent testimony of the respondent, her mother and her sister, that the respondent had not established the statutorily-required 10 years of continual presence in the United States. The Immigration Judge's decision in this regard has not been sufficiently challenged on appeal to warrant a finding by this Board that it was clearly erroneous.

Accordingly, the motion to reopen is denied. The request for a stay is also denied.

/s/ Anthony C. Moscato
FOR THE BOARD